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No. 80-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

SELIGMAN & ASSOCIATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner was the employer of the employees at the 21 residential complexes it managed, and that the complexes constituted an appropriate unit for purposes of bargaining.

2. Whether the Board's procedure in resolving the unit issue was proper.

3. Whether petitioner was prejudiced by the court of appeals' ruling on the Board's unit determination.

4. Whether the Board's remedial order was proper.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 8

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Amalgamated Clothing Workers of America, AFL-CIO v. *NLRB*, 365 F. 2d 898 9

Decaturville Sportswear Co. v. *NLRB*, 406 F. 2d 886 10

NLRB v. *Clark*, 468 F. 2d 459 8

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 6

NLRB v. *Mexia Textile Mills, Inc.*, 339 U.S. 563 11

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 8

Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533 10

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 2(2), 29 U.S.C. 152(2) 2

Section 8(a), 29 U.S.C. 158(a) 2

Page

Statutes—(Continued):

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5, 6
Section 8(a)(3), 29 U.S.C. 158(a)(3) 6
Section 8(a)(4), 29 U.S.C. 158(a)(4) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 639 F. 2d 307. The decision and order of the National Labor Relations Board are reported at 240 N.L.R.B. No. 10 (Pet. App. 5-56).

JURISDICTION

The judgment of the court of appeals (Pet. App. 57) was entered on January 21, 1981. The Company's petition for rehearing was denied on April 30, 1981 (Pet. App. 58). The petition for a writ of certiorari was filed on July 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* ("the Act"), are set forth at pages 1-3 of

the petition. Other relevant portions of the Act are as follows (29 U.S.C. 152(2) and 158(a)):

Section 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * * *

STATEMENT

1. Petitioner is a holding company with several operating divisions, one of which is Scott Management Company. Scott provides property management services to apartment and condominium projects (Pet. App. 8-9; A. 517-518, 903).[1] Scott is completely owned and controlled by petitioner and, as one of its unincorporated operating divisions, answers directly to its board of directors (Pet. App. 9; A. 694-695). Petitioner has contracts with the owners of 21 apartment projects to manage the projects on behalf of the

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[1] "A." refers to the appendix in the court of appeals.

owners (Pet. App. 9; A. 528-529, 549-550, 603). In return for a management fee, paid from the gross income of each apartment complex, petitioner provides a full range of management services and "generally supervises and does all the jobs that an owner would do" (Pet. App. 9-10; A. 559-560, 566-567, 941).

Petitioner maintains a central staff of about 12 employees, including four property managers, who are paid out of its management fee (Pet. App. 10-11; A. 662, 674, 701). Each property manager is assigned to several apartment projects (Pet. App. 11; A. 568-569).[2] At each project, there is an on-site or resident manager and, depending on the size of the project, assistant managers, caretaker couples, and maintenance personnel (Pet. App. 6-7, 12; A. 706-707, 733-735, 742-744). The property managers hire and fire the resident managers at each project (Pet. App. 11; A. 722-723). The resident managers, in turn, hire, fire and assign work to the employees at their projects (Pet. App. 12; A. 707-710, 742-743). Property managers also hire and fire project employees, and transfer resident managers and other employees from one project to another (Pet. App. 11, 12; A. 217-219, 233-234, 446-448, 726, 734, 762-763).

Petitioner determines the range of pay and benefits that employees in the various classifications receive (Pet. App. 13; A. 727-730, 734-735). The resident managers all start at similar wage levels and receive the same benefits—use of an apartment, free utilities, and health insurance (Pet. App. 9; A. 565-566, 723). Within the salary range set by petitioner,

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[2]The property managers visit each complex for which they are responsible once a week to make sure that preventive maintenance programs are carried out, apartments are prepared properly for new tenants, the projects are kept clean, and office files are maintained in proper order (Pet. App. 11; A. 568-569, 702-703).

each resident manager determines the salaries of the various employees at his project, with the additional constraint that salaries must remain within a budget established for the project by the property manager (Pet. App. 11-12; A. 707, 730-731, 742-743). Both the resident managers and project employees are paid from the gross revenues of the apartment projects where they work (Pet. App. 12; A. 600-601, 937). Petitioner, however, maintains a common payroll and accounting system for all employees of the apartment projects (Pet. App. 10; A. 570-571, 582, 637-651). Employees at the various projects are paid with checks drawn on the account of "Seligman & Associates, Inc." and receive a single W-2 form for all work performed at any of the apartment projects (Pet. App. 10; A. 570, 572, 918, 920).

In September 1976, as a result of growing dissatisfaction with working conditions, employees at Eureka Townhouses met to discuss their complaints and select spokesmen to present their grievances to petitioner (Pet. App. 18; A. 74-79, 143-146). On October 7, 1976, petitioner discharged caretaker couple Susan and David Younce because of meetings they attended with other employees and complaints they registered regarding working conditions (Pet. App. 18-20; A. 43-45).[3] As a result of continued employee dissatisfaction, employee Sam Goold contacted Local 79, Service Employees International Union, AFL-CIO ("the

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[3]Following the filing of unfair labor practice charges, petitioner made reinstatement offers to most of the unlawfully discharged employees (Pet. App. 43; A. 116-117, 614). The Younces rejected the reinstatement offer and, later, decided to withdraw their unfair labor practice charge (A. 610-613). On the last day of the six-month limitations period for filing charges, however, the Younces filed a new charge alleging that manager Lincoln LaFrance had violated the Act in discharging them (Pet. App. 15-16). After filing the charge with the Board, Susan Younce personally served a copy of the charge on manager LaFrance at the company's office at the Eureka Townhouse apartments where the Younces worked and were discharged (Pet. App. 16; A. 47-51).

Union"), and a campaign to organize employees at the apartment complexes managed by petitioner began (Pet. App. 28-29; A. 285, 287, 619). On December 8, 1976, the Union filed a petition for election in a unit of all maintenance men, custodians, caretakers, and groundsmen employed at the apartment projects managed by petitioner (Pet. App. 6).

Beginning in December 1976, petitioner repeatedly engaged in conduct designed to discourage employee support for the Union. Petitioner threatened to eliminate the position of caretaker and subcontract maintenance work to outside contractors (Pet. App. 21, 23, 24-25; A. 261, 411-412, 616); interrogated employees about the Union (Pet. App. 22, 23, 24-25; A. 178, 202, 465); threatened to use unlawful means to prevent the Union from coming in (Pet. App. 24-25; A. 210-211); and threatened to discharge employees for and prohibited employees from talking about the Union (Pet. App. 22-23; A. 254, 369-469). In January 1977, following the beginning of the Board hearing on the Union's representation petition, petitioner discharged organizer Sam Goold, purportedly for unsatisfactory work (Pet. App. 29; A. 301-302). This unfair labor practice proceeding was thereafter instituted, and the separate representation procedures were suspended (Pet. App. 2).

2. In a decision affirmed by the Board, the administrative law judge found that petitioner exercised full control over persons employed at the apartment complexes and was, therefore, an "employer" within the meaning of Section 2(2) of the Act (Pet. App. 13-14, 52). The administrative law judge also found that petitioner's threats, interrogations, discharge of the Younces, and prohibition of discussions regarding the Union violated Section 8(a)(1) of the Act (Pet. App. 52-53). Further, the judge found that petitioner's discharge of Sam Goold was motivated by his

Union activities, thereby violating Section 8(a)(3) and (1) of the Act (Pet. App. 53).[4]

To remedy its unfair labor practices, petitioner was ordered to reinstate the unlawfully discharged employees with backpay (Pet. App. 42-43). The Board further ordered that petitioner post notices at all 21 of the apartment complexes. As the administrative law judge explained (Pet. App. 42):

> Inasmuch as the [petitioner's] unfair labor practices directly affected many employees at seven of its apartment complexes, in view of the nature and extent of the unfair labor practices found, and as they were committed by the [petitioner's] managers, project managers, and president, I find no merit in the [petitioner's] contention that notices should be required only in those complexes where unfair labor practices were committed, and find that the policies of the Act will be effectuated by requiring that notices be posted in all 21 complexes employing unit employees.

The General Counsel also requested that petitioner be ordered to bargain with the Union as part of the remedy for the unfair labor practices committed (Pet. App. 43).[5] In

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[4]Petitioner did not except before the Board to the administrative law judge's further findings that it violated Section 8(a)(1) of the Act by promoting employees to the position of assistant manager in an attempt to "gerrymander" the bargaining unit in which the Union election was to be held (Pet. App. 39-40); violated Section 8(a)(3) and (1) of the Act by discharging Union supporters Larry, Ricky, and Charles Davis (Pet. App. 40-42); and violated Section 8(a)(4), (3), and (1) of the Act by discharging Mark Rushing and Harold and Madeline Dodson because they testified or were subpoenaed to testify at the Board hearing on the Union's election petition (Pet. App. 31-36). No issue concerning these findings is involved here.

[5]See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

order to determine whether the Union had obtained authorization cards from a majority of employees, the administrative law judge held that an appropriate unit consisted of petitioner's employees employed at the 21 apartment complexes, including the assistant managers at the complexes who were determined not to be statutory supervisors (Pet. App. 43-44).[6] Because the Union failed to obtain cards from a majority of employees in the unit, the administrative law judge denied the request for a bargaining order (Pet. App. 47-48).

3. The court of appeals upheld the Board's decision and enforced its order. The court concluded that substantial evidence supported the Board's finding that petitioner was the employer of the employees at the apartment complexes. The court stated that "[t]here is ample evidence of Scott's full and centralized control over the employees and that the employees have the common interests necessary to comprise an appropriate unit" (Pet. App. 3). The court rejected petitioner's assertion that it should not rule on the appropriateness of the unit because that issue was pending appeal in the representation proceeding. The court noted that

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[6]During the unfair labor practice hearing, the General Counsel was allowed to place into evidence the 900-page transcript and exhibits from the hearing on the Union's election petition in order to establish that petitioner was the employer of the employees at the projects and that a unit of employees at the 21 apartment complexes was appropriate for the sought-after remedial bargaining order (A. 494-498, 508). Petitioner appealed to the Board the administrative law judge's ruling that the General Counsel could establish the appropriateness of the unit by introducing the transcript and exhibits from the representation proceeding while petitioner was precluded from offering additional evidence on matters included in the representation proceeding (A. 946-948). The Board reversed the administrative law judge "to the extent that any party may call witnesses to testify with respect to the appropriateness of the unit in the representation case" (A. 949). The unfair labor practice hearing was subsequently reopened, and petitioner elicited 150 pages of testimony from its president, Irving Seligman (A. 950, 524-526).

"[t]he issue was relevant to the Board's request for a bargaining order and was fully litigated below" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 14-15) the Board's findings, upheld by the court of appeals, that it was the employer of the employees at the 21 apartment complexes and that the complexes constitute an appropriate unit for bargaining are not supported by substantial evidence.[7] These purely evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as shown above (pages 3-4, *supra*), the record amply supports the Board's findings that petitioner controls the employment relationship of the complexes' employees (Pet. App. 13-14) and that the employees of the 21 apartment complexes share a community of interest sufficient to justify grouping them in a single bargaining unit (Pet. App. 43-44).

2. Petitioner's argument (Pet. i, 10-12) that the Board improperly based the unit determination on the "sole evidence" of the representation proceeding record rests on a significant factual omission. The Board did not rely solely on the representation proceeding record; rather it directed that the unfair labor practice hearing be reopened and

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[7]Petitioner also asserts (Pet. i, 16-17) that three unspecified unfair labor practice findings also are not supported by substantial evidence. Since the petitioner does not in any way substantiate that claim we do not deal with it here. Petitioner also asserts (Pet. 12-14) that the Younces' charge was procedurally defective. The court of appeals (Pet. App. 4) upheld the Board's finding that service was properly made on the property manager at the complex where the Younces worked and found no evidentiary support for petitioner's assertion of a waiver. The court further found "no reason to invoke the equitable doctrine of estoppel" (*ibid.*). These findings are based on the particular facts of this case and raise no issue warranting review by this Court. In any event service here was plainly sufficient under the Act. See *NLRB* v. *Clark*, 468 F. 2d 459, 463 (5th Cir. 1972).

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petitioner be allowed to call any witness to testify as to the unit issues. Petitioner availed itself of that opportunity and elicited 150 pages of testimony on the issue. In these circumstances, admission of the representation proceeding record in no way deprived petitioner of the opportunity to present its case.[8] See *Amalgamated Clothing Workers of America, AFL-CIO* v. *NLRB*, 365 F. 2d 898, 905 (D.C. Cir. 1966).

3. There is no merit to petitioner's additional contention (Pet. i, 8-9) that it was prejudiced by the court of appeals' determination of the unit issue because that issue should properly be resolved in the representation proceeding that was pending on appeal to the Board at the time of the unfair labor practice proceeding. As the court of appeals noted (Pet. App. 3), the administrative law judge had to make a unit determination in considering the merits of the General Counsel's request for a bargaining order. Although petitioner now asserts the court of appeals erred in determining the unit issue, it was petitioner who requested the court of appeals to review the merits of the unit issue should the court find that the administrative law judge properly reached the issue (see petitioner's brief in the court of appeals at 1-2, 15-16, 29-37; a copy of this brief has been lodged with the Clerk of this Court). Having decided, adversely to petitioner, that the administrative law judge properly reached the unit issue, the court then reviewed the substantiality of the evidence supporting the unit

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[8]Petitioner also contends that the administrative law judge erred in admitting the Regional Director's unit determination into the record. However, the Regional Director's decision was not determinative of any issue in the unfair labor practice proceeding, and the administrative law judge made an independent determination of the unit and employer issues based on the testimony and exhibits before her (Pet. App. 13-14, 43-44).

determination—an issue placed before the court and extensively briefed by petitioner.[9] In these circumstances petitioner cannot be heard to complain that it was prejudiced by the court's resolution of an issue that it requested the court to review.

4. Finally, there is no merit to petitioner's objections (Pet. i, ii, 16-17) to the Board's remedy. Petitioner asserts (Pet. 16) that there was no factual basis for the Board's order requiring it to post notices at all of the 21 complexes it managed. Petitioner discharged nine employees and made numerous coercive statements and threats over an extended time period (see pages 4-5 and note 4, *supra*). Further, the company's unfair labor practices were centrally directed and occurred at seven of the 21 apartment complexes. Given the pervasiveness of petitioner's unfair labor practices, the Board's notice posting order, aimed at countering the coercive effects of the petitioner's actions, was well within the Board's authority and is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). And see *Decaturville Sportswear Co.* v. *NLRB*, 406 F. 2d 886, 888-889 (6th Cir. 1969).

Petitioner also complains (Pet. 17) that it was improperly ordered to reinstate the discharged employees, asserting that it had already reinstated some of them. The administrative law judge left resolution of the question "[w]hether or not the [petitioner] has made adequate offers of reinstatement to some of the discriminatees" to the compliance stage

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[9]Contrary to petitioner's assertion (Pet. 9), there was no "stipulation" or agreement between the Board and petitioner not to contest the unit determination. The Board took the position in the court of appeals that there was no occasion for the court to review the unit determination since petitioner had prevailed before the Board on the bargaining order issue.

of this proceeding, explaining that the matter "was not fully litigated" (Pet. App. 43). The Board's reinstatement order included backpay. If, as petitioner claims, it made valid reinstatement offers to some of the unlawfully discharged employees, this fact will mitigate any backpay claims formulated in compliance proceedings. In any event, the law is long settled that the Board is entitled to enforcement of its order even if petitioner has complied with it. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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